UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 10-1338 AG (RNBx)	Date	April 23, 2012
Title	SPORTING SUPPLIES INTERNATIONAL, INC. v. TULAMMO USA, INC., et al.		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[TENTATIVE] ORDER DENYING MOTION TO MODIFY SCHEDULING ORDER**

This case started as a dispute between competitors in the U.S. ammunition market, and has devolved into a pleading war. Before the Court is the Motion of Plaintiff, Counterclaim-Defendant, and *Counterclaimant-in-Reply* Sporting Supplies International, Inc. ("SSI") "for Modification of the Scheduling Order and for Leave to File Third Amended Complaint" ("Motion"). Defendants, Counterclaimants, and *Counter-Defendants-in-Reply* Tula Cartridge Works ("Tula"), Ulyanovsk Cartridge Works ("Uly"), Tulammo USA, Inc. ("Tulammo"), and Eurosports, LLC ("Eurosports") (together, "Defendants") oppose the Motion, which the Court DENIES.

BACKGROUND

SSI sells Russian-manufactured rifle and handgun ammunition in the United States. (Second Amended Complaint ("SAC") ¶ 14.) Tula and Uly are Russian ammunition manufacturers that formerly supplied "Wolf" brand ammunition to SSI. (Second Amended Countercomplaint ("SACC") ¶¶ 3, 4, 10, 11.) The business relationship between SSI and Tula and Uly soured in 2010, around the time Tula and Uly launched

Defendant Tulammo USA, Inc. ("Tulammo"), a U.S.-based ammunition distributor, to compete with SSI. (*Id.* ¶¶ 21-22.)

A brief description of the complex procedural history of this case frames the following analysis. SSI served its original Complaint on Tulammo and distributor Eurosports in September 2010. SSI then twice amended its pleadings. Tulammo and Eurosports filed counterclaims in February 2011, before twice amending these claims. SSI did not serve Tula or Uly until November 2011, shortly after the Court granted SSI's motion for authorization of alternative service of process.

In December 2011, less than one month after they were served with SSI's SAC, Tula and Uly asserted counterclaims against SSI for unfair trade practices, unfair competition, and fraud. In January 2012, SSI asserted "counterclaims in reply" against all Defendants for fraud, unfair trade practices, and unfair competition. Defendants then moved to dismiss SSI's counterclaims in reply. The Court denied the motion as to SSI's counterclaim in reply for fraud, but granted it as to SSI's counterclaims in reply for unfair trade practices and unfair competition.

Having abandoned its "counterclaims in reply" seeking to allege unfair competition and unfair trade practices, SSI now moves to modify the Court's Scheduling Order so that it may add these claims to its initial pleadings.

LEGAL STANDARD

A party attempting to amend a pleading after the date specified in a scheduling order must first satisfy the "good cause" standard of Federal Rule of Civil Procedure 16(b)(4). *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992).

"Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the

party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. When evaluating whether a party was diligent, the Ninth Circuit has determined that "the focus of the inquiry is upon the moving party's reasons for modification. If that party was not diligent, the inquiry should end." *Id.* at 610. Only after the moving party proves that it was diligent in seeking an amendment should a court apply the standard under Rule 15 to determine if the amendment is proper. *Id.* at 608.

PRELIMINARY MATTERS

Before discussing the merits of SSI's Motion, the Court briefly addresses some confusion in the parties' papers.

In its Motion, SSI states that "on March 9, 2012, this Court ruled that SSI's claims against Defendants for unfair trade practices and unfair competition could *only* be asserted by obtaining modification of the Scheduling Order and seeking leave to amend the pleadings." (Motion at 1:14-19 (emphasis).) This is not an accurate interpretation of the Court's March 9, 2012 Order.

In that Order, the Court granted Defendants' motion to dismiss SSI's counterclaims in reply for unfair competition and unfair trade practices after finding that those counterclaims, *as alleged*, were not compulsory. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1525 (9th Cir. 1985) (holding that while the Rules "do not expressly authorize a plaintiff's bringing of 'counterclaims in reply' to a defendant's counterclaims, the weight of authority allows the plaintiff to file such pleadings if the counterclaims in reply are *compulsory*, but denies them if permissive").

But the Court did *not* rule that SSI could only file these claims by modifying the Scheduling Order and amending its initial pleadings. Indeed, the Court specifically

authorized SSI to "file *amended* counterclaims in reply [for unfair competition and unfair trade practices] within 14 days of [the March 9, 2012] Order." Instead of seeking to amend its counterclaims in reply, SSI simply proceeded with this Motion.

In their Opposition, Defendants argue that "because the time for the parties to amend their pleadings has expired, Federal Rule of Civil Procedure 15(a) and its liberal policy in favor of amendment do not apply." (Opp'n at 5:21-25.) This is incorrect. As explained in the Legal Standard section, Rule 15(a) still applies, but only if SSI makes a showing of good cause under Rule 16. This isn't the first time Defendants has misstated the law in its papers. (*See* Dkt. No. 31 at 3 of 18.)

ANALYSIS

The Court's February 7, 2011 Scheduling Order set August 8, 2011 as the deadline for joinder and amendment motions. (Dkt. No. 31 ¶ 3 ("Absent exceptional circumstances, any motion to join another party or to amend a pleading shall be filed and served [by August 8, 2011].").) As noted, SSI first filed its unfair competition and unfair trade practices claims against Defendants – as counterclaims in reply – in January 2012. After the Court dismissed these counterclaims in reply with leave to amend, SSI switched gears and moved to modify the Scheduling Order.

SSI argues that good cause exists to modify the Scheduling Order because it "lacked sufficient information and belief to state its proposed claims for unfair trade practices and unfair competition until late December 2011 . . . ." (Motion at 4:17-25.) The thrust of SSI's argument is that it diligently sought this information from Defendants, who refused to timely produce it. (*See id.*) Defendants argue that SSI fails to satisfy Rule 16's "good cause" standard because its discovery efforts were insufficiently diligent. The Court agrees with Defendants.

SSI served its first request for production ("RFP") on Defendants in February 2011, and

Defendants produced its responses one month later. SSI then served a second RFP on Defendants in July 2011 – five months after the Scheduling Order and just weeks before the August 8, 2011 deadline to amend pleadings. Apparently dissatisfied with Defendants' responses to its RFPs, SSI filed three motions to compel in November 2011 – more than three months after the deadline to amend pleadings.

SSI fails to establish that it was sufficiently diligent in seeking discovery from Defendants. While SSI's first RFP was promptly filed, SSI delayed unnecessarily in filing both its second RFP and its motions to compel. If SSI deemed Defendants' March 2011 response to its February 2011 RFP to be unsatisfactory, SSI should have promptly served a second RFP on Defendants or sought to compel production.

Instead, SSI waited four months after receiving Defendants' first RFP responses before filing a second RFP, and another four months before moving to compel production of any information. In its Motion and Reply, SSI does not adequately explain why it delayed in serving its second RFP and filing its motions to compel. Even if SSI had no reason to know that these documents would contain information sufficient to support additional claims, its lack of diligence during the discovery process precludes modification of the Scheduling Order now.

Further, SSI's strategic decision to file its unfair competition and unfair trade practices claims as *counterclaims in reply* unnecessarily delayed this Motion an additional two months. As noted, Tula and Uly filed counterclaims against SSI on December 9, 2011. SSI responded by filing counterclaims in reply in Janaury 2012 against all Defendants. SSI could have moved to modify the Scheduling Order at that time. But instead of seeking to amend its pleadings, SSI rolled the dice and attempted to assert these claims as counterclaims in reply. This strategy succeeded as to SSI's claim for fraud, but failed as to SSI's claims for unfair competition and unfair trade practices. The fact that SSI filed this Motion soon after the Court dismissed two of its three counterclaims in reply doesn't change the fact that SSI could have moved to modify the Scheduling Order months

earlier.

Because the Court finds that good cause to modify the Scheduling Order does not exist, it need not address the parties' arguments concerning Rule 15 and prejudice. The Court also declines to address Defendants' arguments that SSI's claims for unfair trade practices and unfair competition should be rejected as futile.

DISPOSITION

The pleadings in this case resemble a game of schoolyard tag, as the two-page, four-section case caption shows. It's time for this game and both sides' pleading-related gamesmanship to end. The Motion is DENIED.

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